Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law.

Show Me the Fines! EPA's Heavy Hand Spurs Congressional Reaction

On 25 October 1999 the President signed the Defense Appropriations Bill for Fiscal Year (FY) 2000.[1] The bill will have a dramatic effect on how the Army processes and approves the settlement of environmental fines. Section 8149 of the bill directs that none of the funds appropriated for FY 2000 "may be used for the payment of a fine or penalty that is imposed against the Department of Defense or a military department arising from an environmental violation at a military installation or facility unless the payment of *the* fine or penalty has been specifically authorized by law."[2]

The section further provides that funds expended to perform supplemental environmental projects (SEPs) pursuant to a settlement agreement are considered "payment of the penalty." Although some attorneys have pointed out that this section may simply restate the age-old requirement for explicit authorizing statutory language before federal agencies can pay penalties, in fact, the bill's mandate for "the" fine to be specifically authorized is controlling. The ELD interprets Section 8149 to require specific congressional approval for the use of FY 2000 funding to pay for any fines or SEPs.

This interpretation of Section 8149 also corresponds with the general understanding of its origin and purpose. The main catalyst for including this provision in the appropriations bill was Environmental Protection Agency's (EPA) proposal to issue a massive fine at Fort Wainwright, Alaska.[3] Although the installation has not yet received a formal complaint for alleged Clean Air Act violations, the EPA opened preliminary negotiations with a proposed penalty of over $16 million. This single penalty would equal the total for nearly 200 assessed penalties received throughout the Army from all environmental regulators under all media statutes over the past seven years.

Even more alarming than the sheer magnitude of the EPA's settlement offer, however, is the basis for it. Over ninety-nine percent of the proposed fine is based on two types of "business" penalty assessment criteria that have no relevance to federal agencies. First, the EPA proposes to recover $10.5 million for alleged "economic benefits" received by the installation for non-compliance. Second, the EPA is seeking an additional nearly $5.5 million simply because Fort Wainwright is a "large business" and has substantial assets that the EPA presumes the Army can sell or mortgage to raise money to pay for penalties. It is understood that the EPA's attempt to extend these business-based concepts to federal facilities in such a dramatic fashion caused Senator Stevens from Alaska (who is also Chairman of the Senate Appropriations Committee) to press for adding Section 8149 to the appropriations bill while it was being considered by a House-Senate conference committee.

At present, nearly all fines are settled through consent agreements between installation commanders and federal or state regulators, after receiving concurrence by the ELD. The new legislation will require the Army and the Department of Defense (DOD) to maintain strict centralized scrutiny of all such agreements and obtain prior approval from Congress of any penalty payments with FY 2000 funds. On 23 November 1999 Gary D. Vest, Principal Assistant Deputy Under Secretary of Defense (Environmental Security) issued the DOD guidance on the implementation of Section 8149.[4] In addition, the Army ELD has published supplementary guidance to Army installations regarding implementation of Section 8149.[5]

As noted in each of the guidance letters, Section 8149 does not alter the basic aspects of negotiating settlement agreements. Installation environmental law specialists (ELSs) will continue to negotiate consent agreements with federal or state regulators,

1. Pub. L. No. 106-79, 113 Stat. 1212 (1999).

2. *Id.* § 8149 (emphasis added).

3. Letter from United States Environmental Protection Agency to Staff Judge Advocate, Ft. Wainwright, Alaska (Aug. 25, 1999) (on file with author).

4. Memorandum, Gary D. Vest, Acting Deputy Under Secretary of Defense (Environmental Security) to Deputy Assistant Secretary of the Army (Environment, Safety & Occupational Health), Deputy Assistant Secretary of the Navy (Environment & Safety), Deputy Assistant Secretary of the Air Force (Environment, Safety & Occupational Health), Director, Defense Logistics Agency, subject: Implementation of Section 8149 of the FY 2000 Defense Appropriations Act (23 Nov. 1999) *available at* <http://www.denix.osd.mil/denix/Public/ES-Programs/Compliance/Memos/Section8149/note6.html>.

5. Memorandum, Chief, Environmental Law Division, to United States Army Staff Judge Advocates, subject: Approval of Environmental Consent Agreements under the Defense Appropriations Bill for Fiscal Year 2000 (3 Dec. 1999). This memorandum was distributed via e-mail to all Staff Judge Advocates on 7 December 1999 (on file with author).

and installation commanders will continue to be the Army's signatories for those agreements.

Two significant changes have been implemented, however. First, all consent agreements must include a provision indicating that any payment of fines or SEPs is subject to congressional approval. Second, installations are now required to prepare a settlement memorandum that explains why any payments for fines and SEPs are appropriate. The settlement memorandum is necessary for DOD to pursue receiving a line-item budget authorization from Congress. In cases where the value of a SEP exceeds the reduction in fine amount, particular care must be given to point out whether regulatory agencies are giving penalty offset credit for SEPs that were already programmed into environmental budgets prior to the enforcement action. Major Cotell.

Shedding Some Light on Tritium Exit Signs

Tritium exit signs have been used on Army installations for a number of years. Legal requirements apply to the installation, servicing, removal, and transfer of tritium exit signs.[6] This note outlines the legal requirements and issues installation environmental law attorneys should be aware of in this admittedly obscure but important area of law.

Tritium is defined as a rare radioactive hydrogen isotope with atomic mass.[7] The radioactive properties of tritium are useful in the production of a continuous light source. A continuous light source can be produced by mixing tritium with a chemical that emits light in the presence of radiation (a phosphur). Typically such continuous light sources are useful where dim light conditions require illumination without the use of electricity or batteries. Exit signs are an example of the practical use of tritium to produce a continuous light source that is reliable in the event of power outages and blackouts, where generator or battery power is unavailable as a backup power source.[8]

Tritium exit signs are regulated by the Nuclear Regulatory Commission (NRC), which issues a general license to federal government agencies (among others) to "acquire, receive, possess, use or transfer . . . byproduct material contained in devices designed and manufactured for the purpose of . . . producing light or an ionized atmosphere."[9] The Army is considered a general licensee by definition, and no application for a general license is required. As a general licensee the Army must comply with certain requirements regarding tritium exit signs.

These requirements include assuring that labels affixed to the sign stating that removal of the sign is prohibited are maintained;[10] installing, servicing, or removing tritium exit signs be performed by a person holding a specific license to perform such activities;[11] maintaining records of the performance of installation, servicing, and removal from the installation of tritium exit signs[12] for a period of three years;[13] and not abandoning a device containing byproduct material (tritium).[14] The requirements to test devices containing byproduct material do not apply to devices containing only tritium,[15] thus the exit signs do not have to be tested.

The above requirements should not present major problems for installations that currently use tritium exit signs in their buildings. Environmental law attorneys should ensure that appropriate installation personnel (local Radiation Safety Officers and Directorates of Public Works personnel) are aware of the above requirements to insure compliance. Particular attention should be paid to situations where demolition of buildings is contemplated. If the Army is demolishing buildings, tritium signs should be removed and disposed of prior to demolition in accordance with *Army Regulation 11-9*.[16] It is important to note that the NRC recently cited an Army installation for failure to maintain records for generally licensed

6. *See generally* 10 C.F.R. § 31.5 (1999).

7. The American Heritage Dictionary 723 (2d ed. 1983).

8. Information formerly available on University of Michigan School of Public Health Homepage (last modified Oct. 7, 1999) <http://www.sph.umich.edu:80/group/eih/UMSCHPS/tritium.htm> (on file with author).

9. 10 C.F.R. § 31.5(a).

10. *Id.* § 31.5(c)(1).

11. *Id.* § 31.5(c)(3)(ii).

12. *Id.* § 31.5(c)(4). *See* U.S. Dep't of Army, Reg. 11-9, The Army Radiation Safety Program, paras. 1-4(k)(4), 2-7(b) (28 May 1999) (requiring each commander to maintain an inventory of radiation sources in accordance with the requirements of NRC licenses and providing radioactive waste disposal guidance).

13. 10 C.F.R. § 31.5(c)(4)(iii).

14. *Id.* § 31.5(c)(6).

15. *Id.* § 31.5(c)(2)(ii).

16. U.S. Dep't of Army, Reg. 11-9, The Army Radiation Safety Program.

devices, and for unauthorized disposal of licensed materials, illustrating the importance of compliance with the above requirements.[17]

Perhaps the more challenging situation occurs where the Army attempts to transfer buildings containing tritium exit signs to a third party through the Base Realignment and Closure (BRAC) process. Army real property is often transferred through the BRAC process to a third party called a Local Reuse Authority (LRA). Typically the LRA then develops the property pursuant to a reuse plan. In this situation the Army, as a general licensee, may only transfer tritium exit signs to another general licensee where the signs remain in use at the transferred building.[18] General licenses are issued to "commercial and industrial firms and research, educational and medical institutions, individuals in the conduct of their business, and Federal, State or local government agencies."[19] Local Reuse Authorities are sometimes local government agencies or quasi-governmental entities. In cases where the LRA is a government entity, the restriction on transfer only to another general licensee poses no legal impediment to the transfer. Where the transferee is quasi-governmental or private in nature, however, an analysis as to whether the transferee is considered a general licensee under 10 C.F.R § 31.5(a) is required.

Additional requirements exist when transferring tritium exit signs in intact buildings to a third party. Assuming that the transferee is a general licensee, the Army must provide the transferee with a copy of 10 C.F.R § 31.5 and safety documents identified in the label of the device (exit signs) within thirty days of the transfer.[20] The Army must also report to the NRC the manufacturer's name and model number of the device transferred, the name and address of the transferee, and a point of contact between the NRC and the transferee.[21] Individuals working on BRAC transfers of buildings containing tritium exit signs must be aware of the above legal requirements. Model language for transfer documents providing notice of the presence of tritium signs is currently under development.

This information will aid the environmental law attorney in analyzing legal issues involving tritium exit signs. Major Tozzi.

General Conservation Permitting Policy May Cut Much Red Tape

On 28 October 1999, the Fish and Wildlife Service (FWS) published a proposed policy on general conservation permits that may offer efficiencies in how Army activities are permitted by FWS to conduct natural resource research, management and conservation activities.[22] The FWS is accepting comments on the proposed policy until 27 December 1999.

The policy will test the concept of a permit similar to state scientific collecting permits. Under the proposed policy, a single general conservation permit could be issued in lieu of a number of individual permits, with the permitted activities reflecting those whose benefits outweigh their risks to the resource (species or habitat) in question. Under the policy, a general conservation permit would only be available to individuals and institutions that have outstanding professional credentials and that are conducting scientific, management, and conservation activities. The scope of the policy is virtually all activities for which the FWS currently issues permits.

Although the policy does not directly address federal agencies, it does not exclude federal agencies from applying for permits under the policy. Conceivably, an installation natural resource manager could obtain a permit for all research, management, and conservation activities on an installation for up to five years. Major Robinette.

Litigation Division Note

Reimbursement of the Judgment Fund under the Contract Disputes Act

Recently, several installations have inquired about their requirement to reimburse the Judgment Fund[23] for settlements or judgments paid pursuant to the Contract Disputes Act (CDA).[24] This note reviews the substantive and procedural requirements of reimbursing the Judgment Fund.

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17. Message, 041953Z Oct 99, Headquarters, Dep't of Army, DACS-SF, subject: Tritium Exit Signs, para. 3. (4 Oct. 1999).

18. 10 C.F.R. § 31.5(c)(9)(i).

19. *Id*. § 31.5(a).

20. *Id*. § 31.5(9)(i).

21. *Id*. The report should be made to the Director of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

22. Proposed Policy on General Conservation Permits, 64 Fed. Reg. 58,086 (1999).

23. Supplemental Appropriation Act of 1957, 70 Stat. 678, 694 (codified at 31 U.S.C.A. § 1304 (West 1999)). *See* General Accounting Office, 3 Principles of Federal Appropriations Law 14-12 (2d ed.). The Judgment Fund is a *permanent, indefinite* appropriation. This means that it has no fiscal year limitations, no limit on the amount of the appropriation, and no need for Congress to appropriate funds to it annually or otherwise. It operates completely independent of the congressional authorization and appropriation process. It is, in effect, standing authority to disburse money from the general fund of the Treasury.

Congress passed the CDA in 1978.[25] The CDA changed the payment mechanism for both judgments and board awards in contract cases.[26] Before the CDA, court judgments against the United States were paid from the Judgment Fund with no requirement that it be reimbursed.[27] Claims adjudicated before the boards of contract appeals were not paid out of the Judgment Fund; instead, federal agencies paid these claims out of their own funds.[28] Consequently, the procuring agency had some incentive "to avoid settlements and prolong litigation in order to have the final judgment against the agency occur in court, thus avoiding payment out of agency funds."[29]

Absent a specific statutory requirement, an agency is not required to reimburse the Judgment Fund.[30] Section 612(c) of the CDA provides such a statutory requirement. It requires the agency to reimburse the Judgment Fund for the payment of claims made pursuant to a court judgment or monetary award.[31] Under the CDA, a court judgment or monetary award by the boards of contract appeals is viewed as giving rise to a new liability.[32] Hence, repaying the Judgment Fund must be made out of funds current at the time of the judgment, or by obtaining additional appropriations for such purposes.[33]

Although reimbursement is mandatory, the CDA is silent as to the time period in which repayment must occur.[34] Thus, the agency has some discretion in the matter, as the General Accounting Office has recognized.[35]

> It is clear that Congress wanted the ultimate accountability to fall on the procuring agency, but we do not think the statute requires the agency to disrupt ongoing programs or activities in order to find the money. If this were not the case, Congress could have just as easily have directed the agencies to pay the judgments and awards directly. Clearly, an agency does not violate the statute if it does not make the reimbursement in the same fiscal year that the award is paid. Similarly, an agency may not be in a position to reimburse in the following fiscal year without disrupting other activities, since the agency's budget for that fiscal year is set well in advance. In our opinion, the earliest time an agency can be said to be in violation of 41 U.S.C. § 612(c) is the beginning of the second fiscal year following the fiscal year in which the award is paid.

Hence, an agency may violate the Act if reimbursement does not occur by "the beginning of the second fiscal year following the fiscal year in which the award is paid."[36]

At the same time the Judgment Fund issues a check to pay the judgment or monetary award, the Department of the Treasury, Financial Management Service (FMS), simultaneously bills the procuring agency. *Department of Defense Regulation 7000.14-R* suggests that the agency follow the procedures listed below to reimburse the Judgment Fund:[37]

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24. Contract Disputes Act of 1978, 41 U.S.C.A. §§ 601-613 (West 1999).

25. *Id.*

26. S. REP. NO. 95-1118, at 33 (1978).

27. *Id.*

28. GENERAL ACCOUNTING OFFICE, *supra* note 23, at 12-76.

29. S. REP. NO. 95-1118, at 33.

30. Financial Management Service Home Page (visited November 28, 1999) <http://www.fms.treas.gov/judgmentfund/history.html>. *See* Reimbursements to Permanent Judgment Appropriation under the Contract Disputes Act, B-217990.25-O.M., General Accounting Office (October 30, 1987).

31. 41 U.S.C.A. § 612(c) (West 1999). Although monetary awards adjudicated at the board of contract appeals are usually paid directly by the agency, the Judgment Fund may be used to pay those awards in certain circumstances; for example, when the agency has insufficient funds to pay the award.

32. *Id.* *See* Bureau of Land Management–Reimbursement of Contract Disputes Act Payments, 63 Comp. Gen. 308, 312 (Apr. 24, 1984).

33. 41 U.S.C.A. § 612(c). *See* U.S. DEP'T OF DEFENSE REG. 7000.14-R, Vol.3, BUDGET EXECUTION–AVAILABILITY AND USE OF BUDGETARY RESOURCES, para. 080304 (Dec. 1996) [hereinafter DOD REG. 7000.14-R].

34. 41 U.S.C.A. § 612.

35. Reimbursements to Permanent Judgment Appropriation under the Contract Disputes Act, B-217990.25-O.M., General Accounting Office (October 30, 1987). *See* DOD REG. 7000.14-R, para. 080304(F).

36. *Id.*

37. *Id.*

(1) Determine "what appropriation originally funded the portion of the contract that led to the claim and subsequent judgment."

(2) Find funds (if possible) that were "currently available for new obligation at the time of the judgment. Expired appropriations that were current at the time of the judgment also may be used."

(3) Reprogram funds "from existing allocated funds within the appropriation. If sufficient funds do not exist within the appropriation, then supplemental funds must be sought."

(4) "Upon identification of funds to be charged and completion of any reprogramming actions, forward the package to the Defense Finance and Accounting Office having accounting responsibility for the designated fund accounts to process the payment."

(5) If the Judgment Fund reimbursement exceeds $1,000,000, have the cognizant Assistant Secretary of the Military Department (Financial Management and Comptroller) or Defense Agency Comptroller approve the reimbursement.[38]

If reimbursement does not occur, then the FMS will send follow-up inquiries. The tools normally available to the Department of the Treasury to collect a debt from a private party are not available when the debtor is another federal agency.[39] The Department of the Treasury cannot sue another federal agency that fails to reimburse the Judgement Fund, charge interest, or offset the claim against present or future appropriations.[40] If the agency still fails to pay, then FMS could report the agency to Congress.

Reimbursement requirements are not onerous. With a basic understanding of the CDA and *DOD Regulation 7000.14-R*, Army attorneys and the contracting officers they advise can avoid common pitfalls that could embarrass their command. Major Key.

38. *Id.*

39. Antitrust, Fraud, Tax, and Interagency Claims Excluded, 4 C.F.R. § 101.3(c) (1999).

40. *Id.*